



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNC, OPC, FF

Introduction

This hearing was convened in response to an application by the Tenant and an application by the Landlord pursuant to the *Residential Tenancy Act* (the “Act”).

The Tenant applied on December 2, 2016 for:

1. An Order cancelling a notice to end tenancy - Section 47.

The Landlord applied on December 6, 2016 for:

1. An Order of Possession - Section 55; and
2. An Order to recover the filing fee for this application - Section 72.

The Tenant and Landlord were each given full opportunity under oath to be heard, to present evidence and to make submissions.

Preliminary Matter

It is noted as a part of the record of proceedings that this was an in-person hearing. Within minutes of the commencement of the hearing the Landlord started shouting and acting aggressively. The Landlord was ordered to leave the hearing room. Security was called and within 5 minutes the Landlord was allowed to re-enter the hearing room and the hearing recommenced. Thereafter the Landlord conducted himself reasonably well although it is noted that near the end of the hearing the Landlord had to be reminded one more time about his aggressive posturing.

Issue(s) to be Decided

Is the notice to end tenancy valid?

Are the Tenants entitled to a cancellation of the notice to end tenancy?

Is the Landlord entitled to an order of possession and recovery of the filing fee?

Background and Evidence

The tenancy started on May 1, 2015 for a fixed term to end April 30, 2016. A check mark is placed by the section indicating that at the end of the fixed term the Tenants must move out however confirming initials are not present. The addendum to the tenancy agreement indicated that after the end of the fixed term the term can be extended if agreed on new lease conditions by both parties. The tenancy agreement provides that no smoking is allowed in the unit or "within 3 metres of door or window". Rent of \$800.00 is payable on the first day of each month. The tenancy agreement provides that the Tenants pay a portion of the utilities. At the outset of the tenancy the Landlord collected \$400.00 for a security deposit and \$400.00 for a pet deposit. The Landlord also collected \$180.00 as a utility deposit.

On November 25, 2016 the Landlord served the Tenants in person with a one month notice to end tenancy for cause (the "Notice"). Several reasons are indicated on the Notice.

The Landlord states that the Tenants have assigned or sublet the unit. The Parties agree that the Tenants have not moved out of the unit.

The Landlord states that the Tenants breached the tenancy agreement by not moving out of the tenancy at the end of the fixed term. The Landlord states that the Tenants breached a material term of the tenancy by smoking in the unit. The Landlord states that the Tenants breached the tenancy agreement by having two additional occupants in the unit. The Landlord describes the additional occupants as male but has no evidence of any other description. The Landlord states that on a couple of occasions while the Landlord was watching the unit he saw one of those occupants walk up to the

house and then after noticing the Landlord this person kept on walking. The Landlord states that nobody has seen anyone move additional belongings into the house. The Landlord states that the upper tenants have complained about the increase in the utility usage and told the Landlord that the extra occupants have caused this increase.

The Tenants deny that anyone other than themselves is living in the unit. The Tenants state that the one man is Tenant SR's boyfriend and that the other person is a transgender woman who lives very close to the unit. The Tenant states that neither live with the Tenants. The Tenants state that the woman is a friend and often stops by on her walk home. The Tenants state that the boyfriend only visits and has his own residence. The Tenant provides the address and a copy of the boyfriend's driver's licence. The Landlord confirmed receiving a copy of this licence.

The Landlord states that the Tenants were given a warning letter dated November 25, 2016 of the breaches in relation to the occupants and smoking. It is noted that this letter does not set out any time for the Tenants to remedy the breaches.

The Landlord states that the Tenants have engaged in an illegal activity in the unit by smoking marihuana and that this along with the cigarette smoking disturbs the upper tenants.

The Landlord states that the upper tenants have complained that the Tenants are making noise by playing music until 1:00 a.m., usually on week-ends, and that this has occurred several times. The Landlord states that he thinks the upper tenants called him on three occasions, once in July and once in August and that after August there have been no complaints. The Landlord states that he has not attended the unit on any of the occasions that the upper tenants complained. The Landlord states that the upper tenants never told the Landlord how many instance of loud music occurred. The Landlord states that the lower unit was built within a house and no sound barrier exists between the upper and lower lever.

The Tenants states that they do not have any sound system only TV speakers. The Tenant states that the upper tenants never complained to them about music and in fact once told the Tenants that they were never heard by the upper tenants. The Tenant states that the upper tenants are a family of 6 who stomp and scream and make loud noises all day. The Tenant states that they may have increased the volume on the TV at times in order to hear over the upper tenants' noise.

The Landlord provides a letter from the upper tenants dated September 6, 2016 in relation to extra occupants, loud music, marihuana and tobacco smoke and butts all over the property. It is noted that this letter indicates that the upper tenant "tried to gather as much evidence as I could ..."

The Tenants deny smoking any marihuana and Tenant RC the mother of Tenant SR states she cannot tolerate smoke smells. Tenant SR states that she smokes cigarettes outside the unit and that since the upper tenants complained about the smoke she has moved to the street to smoke.

The Landlord made some unclear remarks at the end of the hearing about problems with the cost of insurance for the lower unit however this evidence was not clarified and no further evidence was provided on this point.

Analysis

Section 20 of the Act provides that a landlord may not require or accept more than one security deposit in respect of a tenancy agreement. Section 19 of the Act provides that if a landlord accepts a security deposit that is greater than half the amount of monthly rent, the tenant may deduct the overpayment from rent or otherwise recover the overpayment. As the Landlord has taken a deposit to secure the Tenants' liability for utility costs I find that the Landlord has taken a security deposit amount that exceeds the amount allowed under the Act. As such the Tenants may deduct \$180.00 from future rent payable in full satisfaction of the overpayment.

Section 47 of the Act provides that A landlord may end a tenancy by giving notice to end the tenancy if, inter alia, one or more of the following applies:

- there are an unreasonable number of occupants in a rental unit;
- the tenant or a person permitted on the residential property by the tenant has
 - significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property,
 - seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant, or
 - put the landlord's property at significant risk;
- the tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that
 - has caused or is likely to cause damage to the landlord's property,
 - has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property, or
 - has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord;
- the tenant has failed to comply with a material term, and has not corrected the situation within a reasonable time after the landlord gives written notice to do so; and
- the tenant purports to assign the tenancy agreement or sublet the rental unit without first obtaining the landlord's written consent

The Landlord's evidence of extra occupants is highly speculative and is only evidence of seeing two men at the unit on various times. The Landlord's description of the occupants and of him seeing these persons in the unit is vague to non-existent. I struggle with the credibility of the upper tenants' letter that indicates extensive effort to produce evidence. There is no evidence of anyone moving their belongings into the

unit. I also accept the Tenant's credible evidence that one of these persons is a woman and that the other person is a boyfriend, both of whom have residences elsewhere.

Evidence of only three music episodes and otherwise vague and undetailed evidence of noise is not evidence of any significant interference or unreasonable disturbance.

There is no evidence that the Landlord's property was put at risk by any actions of the Tenants. While it may be that marihuana is smoked by one of the Tenants or the guests, given the upper tenants' letter indicating butts on the property and accepting that one of the Tenants does not tolerate smoke I find on a balance of probabilities that smoking is only occurring outdoors and away from the upper unit. There is no evidence of any adverse effect of anyone's physical well-being or jeopardy to health or safety from this smoking and this would be within the terms of the tenancy agreement.

As the letter dated November 25, 2016 was given to the Tenants at the same time as the Notice and as there is no allowance provided in that letter for the Tenants to remedy any breach, I find that the Landlord has not substantiated that the Tenants breached a material term of the tenancy agreement that was not corrected after being given time to do so.

As the Tenants are living in the unit there is no evidence that the Tenants have sublet or assigned the unit to anyone. As there are no confirming check marks requiring the Tenants to move out at the end of the fixed term, given the addendum providing for another tenancy agreement, considering that no new tenancy agreement was entered into and noting that the Landlord has not provided any evidence that the Tenants were asked to move out of the unit in April 2016 I find that the tenancy continued on a month to month with the same terms and conditions as exist in the tenancy agreement since April 2016. The tenancy agreement therefore does not require the tenancy to end until ended in accordance with the Act.

I note that the Tenants, a mother and daughter, presented themselves and their evidence in a quiet, gentle and respectful manner and do not at all appear to be tenants

that would create any cause for an end to a tenancy. It appears more likely to me that the Landlord has ulterior motives to end the tenancy and I caution the Landlord against using the Act in such a way to end this tenancy.

For all the above reasons I find that the Landlord has not substantiated any of the reasons indicated on the Notice. I find therefore that the Tenants are entitled to a cancellation of the Notice. The tenancy continues and the Landlord's application is dismissed.

Conclusion

The Notice is cancelled and of no effect. The Landlord's application is dismissed.

I grant the Tenants an order under Section 67 of the Act for **\$180.00**. If necessary, this order may be filed in the Small Claims Court and enforced as an order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: January 13, 2017

Residential Tenancy Branch